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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2019AP001082-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL ANTHONY DOTSON,

Defendant-Appellant.

On Appeal from the Judgment of Conviction Entered in the Circuit Court for Brown County, the Honorable William Atkinson, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

Law enforcement lacked reasonable suspicion to believe that Dotson was under the influence of an intoxicant to a degree which rendered him incapable of safely driving, or that he had a blood alcohol concentration at or above 0.08.

A. Dotson correctly noted that reasonable suspicion is the appropriate standard.

The state misrepresents Dotson's arguments from his brief-in-chief.

The state, without any citation to Dotson's brief, writes:

> Dotson completely ignores the Wisconsin Supreme Court's discussion of the degrees of probable cause from the *Renz* case, and *instead argues that a much higher level of probable cause is needed for a law enforcement officer to administer SFSTs*–essentially asserting that the reasonable suspicion to administer SFSTs is akin to the probable cause needed to arrest an individual for OWI.

(State Brief, pp.10-11)(emphasis added). Nowhere in Dotson's brief-in-chief does he argue that probable cause is needed in order to conduct field sobriety tests. Dotson's brief does not contain anything even remotely resembling that argument.

Dotson does not dispute, and has never disputed, that reasonable suspicion is a lower standard than the "probable cause to believe" standard that is required to conduct a preliminary breath test, and the even more stringent "probable cause to arrest" standard. *See* Wis. Stat. §§343.303; *see also County of Jefferson v. Renz*, 231 Wis.2d 293, ¶44, 603 N.W.2d 541 (1999). It is bewildering why the state seems to believe this is disputed. This is truly a non-issue.

The sole issue in Dotson's appeal is whether there was reasonable suspicion to conduct the field sobriety tests.

Dotson never mentioned the standard for conducting preliminary breath tests, or the distinction between "probable cause to believe" and "probable cause to arrest" in his brief-in-chief, because they are not the applicable standards for his appeal.

Nor did Dotson discuss *County of Jefferson v. Renz*, 231 Wis.2d 293, 603 N.W.2d 541 (1999), because the sole issue in *Renz* was whether an officer is required to have probable cause for arrest before asking a suspect to submit to a preliminary breath test – not whether there was reasonable suspicion for the field sobriety tests. It is puzzling why the state devotes so much argument over the standard for preliminary breath tests, when that is not an issue in this appeal.

To be clear, Dotson is not arguing that probable cause is needed to conduct field sobriety tests. Indeed, he never even used the words "probable cause" in his brief except to quote the circuit court in its flawed analysis. To be clear, Dotson is not arguing that a "higher level of reasonable suspicion" or any other special type of reasonable suspicion is needed to conduct field sobriety tests. (State's Brief, p.12). To be clear, Dotson is not arguing that the standard for field sobriety testing is the same as the standard for preliminary breath tests.

Rather, Dotson has consistently and clearly argued that the standard for conducting field sobriety tests is reasonable suspicion. (Dotson Brief-in-Chief, pp.10-17). Dotson then provided a definition of what reasonable suspicion is. (Dotson Brief-in-Chief, p.12). Dotson is using the same "reasonable suspicion" that is used in *Leon*, to which he cited and analyzed. (Dotson Brief-in-Chief at pp. 13, 16-17); *County of Sauk v. Leon*, No. 2010AP001593, unpublished (Ct. App. Nov. 24, 2010).

B. The standard to conduct field sobriety tests is *not* reasonable suspicion that Dotson was drinking before driving; it is reasonable suspicion that Dotson was under the influence of an intoxicant to a degree which rendered him incapable of safely driving, or that he had a blood alcohol concentration at or above 0.08. This case lacks sufficient building blocks to support reasonable suspicion of an OWI.

The state argues that field sobriety tests are simply tools to assist the officer in assessing the level of impairment, and it highlights the line from *Renz* stating: "If [the officer's] observations of the driver are not sufficient to establish probable cause for arrest for an OWI violation, the officer may request the driver to perform various field sobriety tests." (State Brief, pp.9,11-12).

While it is of course true that field sobriety tests are tools to assist law enforcement in discerning various indicia of intoxication, there is still a minimum threshold that must be met before conducting those tests: reasonable suspicion. *See State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis.2d 406, 659 N.W.2d 394. That is what Dotson argues is lacking here.

The state argues that Officer Hock had reasonable suspicion to administer field sobriety tests to Dotson. (State's Brief, pp.8,18-19). But the important question is: reasonable suspicion of what?

Reasonable suspicion of drinking before driving is not enough. Wis. Stat. §346.63(1)(a) does not prohibit driving after having consumed alcohol.[1]

[1] This is not like a marijuana case, where possessing even the smallest amount is illegal and therefore provides reasonable suspicion of a crime. *See State v. Secrist*, 224 Wis.2d 201, 589 N.W.2d 387 (1999).

Rather, there has to be reasonable suspicion for the violation of an *actual* crime or ordinance. *See State v. Colstad*, 2003 WI App 25, ¶8. The alleged crimes were, as stated in the statutes: (1) that he was under the influence of an intoxicant to a degree which rendered him incapable of safely driving, and (2) that he had a blood alcohol concentration at or above 0.08. *See* Wis. Stat. §§346.63(1)(a), 346.63(1)(b) & 340.01(46m).

What is required for the former is reasonable suspicion that the driver was under the influence of an intoxicant. *Colstad*, 2003 WI App 25, ¶19. The definition of "under the influence of an intoxicant" is that "the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage." WIS JI–CRIMINAL 2663. "What must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." WIS JI–CRIMINAL 2663; *see also State v. Gentry*, 2012 WI App 73, ¶6, 342 Wis.2d 252, 816 N.W.2d 352, unpublished (Ct.App. May 24, 2012)(App.101-103)[2] ("Thus, to extend a traffic stop to request that the driver perform a field sobriety test, an officer must have a 'reasonable suspicion, grounded in specific and articulable facts and reasonable inferences from those facts,' *that the driver has consumed enough alcohol to impair his or her ability to drive."*)(citing *Colstad*, 2003 WI App 25, ¶¶8,19)(emphasis added); *see also Leon*, No. 2010AP001593, ¶15, unpublished (App.104-110)("Before detaining a person to conduct field sobriety tests, an officer must have *reasonable suspicion that the person has been driving after the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle*.")(emphasis added).

[2] *Gentry* and *Leon* meet the criteria for unpublished persuasive authority under Wis. Stat. §809.23(3)(b), as they are authored opinions by a single judge under s. 752.31(2)(f), and they were issued after July 1, 2009. In accordance with Wis. Stat. §809.23(3)(c), a copy of each is included in the appendix to this reply brief. (App. 101-110).

The state argues that "an arresting officer will rarely have knowledge of the driver's ability 'to exercise the clear judgment and steady hand necessary to control a motor vehicle' until *after* the driver has performed the SFSTs." (State Brief, p.11)(emphasis in original). But that is not true.

OWI cases very often begin with the driver getting pulled over for some type of unsafe, bad, or unusual driving, with other clues of physical intoxication quickly following before the field sobriety test. *Leon*, No. 2010AP001593, unpublished, ¶¶18-19 ("We begin the analysis by noting that this case is somewhat unusual in that the deputy lacked proof of reckless or inattentive driving by Leon. The deputy was not aware of any driving behavior by Leon indicative of impaired driving, or even of imprudent driving. This contrast sharply with the many cases in which a law enforcement officer has observed weaving, evasive driving, speeding, excessively slow driving, or other erratic or dangerous behavior behind the wheel that might reasonably be thought to correlate with impaired driving...").[3]

[3] *See also State v. Swanson*, 164 Wis.2d 437, 475 N.W.2d 148 (1991), abrogated on other grounds by *State v. Sykes*, 279 Wis.2d 742, 695 N.W.2d 277 (2005)(defendant was driving erratically around bar time, almost hit a pedestrian, and smelled of alcohol); *State v. Waldner*, 206 Wis.2d 51, 556 N.W.2d 681 (1996)(unusual driving at 12:30am, followed by dumping liquid from plastic cup); *State v. Post*, 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634 (defendant was weaving across the travel and parking lanes, incident took place at night); *West Bend v. Wilkens*, 2005 WI App 36, 278 Wis.2d 643, 646, 693 N.W.2d 324 (defendant was traveling fifty miles per hour, thus exceeding the speed limit by twenty miles per hour); *State v. Haynes*, 2001 WI App 266, 248 Wis.2d 724, 638 N.W.2d 82 (car went through red stoplight, driver smelled of intoxicants, had slurred speech, bloodshot and glassy eyes); *State v. Lange*, 2009 WI 49, 317 Wis.2d 383, 766 N.W.2d 551 (drove dangerously and erratically around bar time, and officer knew driver had prior OWI); *County of Dane v. Campshure*, 204 Wis.2d 27, 552 N.W.2d 876 (1996)(car remained stopped throughout entire green light, driver fell asleep at the wheel, and officer smelled intoxicants); *In re Anagnos*, 2012 WI 64, 341 Wis.2d 576, 815 N.W.2d 675 (unusual and impulsive driving choices at 1:15 a.m.).

That unsafe, bad or unusual driving in a typical OWI case (evidence that is present *before* field sobriety tests) goes directly to the driver's inability to exercise the clear judgment and steady hand necessary to control a motor vehicle. Surely, Dotson cannot think of stronger evidence of a driver's inability to safely operate a vehicle than the driver unsafely operating an actual vehicle.

Bloodshot eyes, glassy eyes, an unsteady gait, and slurred speech are also factors that frequently give rise – before the field sobriety tests – to an officer's reasonable suspicion that the driver had committed the offense of driving while intoxicated, because they suggest that the driver was drinking to a degree that has rendered them incapable of safely driving. If a driver cannot walk straight or speak clearly, then that indicates their ability to drive is impaired. If a driver has bloodshot or glassy eyes, then this indicates the driver has had a sufficient amount to drink to affect their body and therefore their ability to drive. All of these are relevant to *how much* the person had to drink.

But the clues in the instant case do not aggregate to reasonable suspicion that Dotson had consumed enough alcohol to impair his ability to safety control his vehicle, or to reach a blood alcohol concentration of 0.08. There were no outward bodily signs that Dotson had drank to the point where his driving would be impaired, such as unsteady gait, slurred speech, glassy eyes, or bloodshot eyes. Alcohol on his breath does not tell us how much he had to drink. Driving at bar time, smoking a cigarette, putting the window down six inches, and a 35 second delay in getting out of the car when trying to make arrangements for his car, do not fill in those gaps sufficiently. We are lacking evidence to show that Dotson's ability to drive his car was impaired.

Especially when considering *Leon's* rule that requires the other factors to be "more substantial" in order to find

reasonable suspicion when there is no bad driving, there is simply not enough here for reasonable suspicion that Dotson (1) was under the influence of an intoxicant to a degree which rendered him incapable of safely driving, or (2) had a blood alcohol concentration at or above 0.08. *See* Wis. Stat. §§346.63(1)(a), 346.63(1)(b), & 340.01(46m).

The state alleges that Dotson argued "that there must (sic) also be some bad or unusual driving, in addition to a 'mere' odor of intoxicants, to support a reasonable suspicion to administer SFSTs…" (State's Brief, p.14). The state misrepresents Dotson's argument.

Dotson did not argue that there must be bad driving in order to find reasonable suspicion. Dotson argued that, under *Leon*, when an officer is not aware of bad driving, then other factors must be more substantial. (Dotson Brief-in-Chief at pp. 13,17).

Furthermore, the state alleges:

> Dotson argues that any of these factors noted by Hock *prior* to detecting the odor of intoxicants should *not* be included in this court's analysis of the evidence, because prior to Hock smelling the odor of intoxicants it was just a hunch. … Dotson does not get to leave certain factors out of the equation because the particular factor, standing on its own, does not establish a reasonable suspicion.

(State Brief, pp.13-14). The state misunderstands Dotson's argument. Dotson was not arguing that the factors prior to the odor of alcohol should be left out of the analysis. In fact, he argued the opposite. Dotson's brief states:

> The problem with this is that the mere odor of alcohol, *combined with the other clues*, does not tell us whether Dotson had consumed enough alcohol…

(Dotson Brief-in-Chief at p. 15)(emphasis added). Dotson's point was that the clues prior to the odor of alcohol did not provide reasonable suspicion of an OWI by Officer Hock's admission, and *adding* the odor of alcohol to those "building blocks" did not tip the scales into reasonable suspicion because neither that clue, nor the other clues combined with that, aggregate to show that Dotson had consumed enough alcohol to impair his ability to safely drive. (Dotson Brief-in-Chief at pp.15,17).

In his brief, Dotson analyzed the factors together – including those prior to the odor of alcohol. (Dotson Brief-in-Chief at pp.16-17). Dotson never conducted a reasonable suspicion analysis solely with the odor of alcohol without also factoring in the clues present before that.

Dotson agrees that the experience of the detaining officer is a factor to consider in an assessment of the totality of the circumstances. *State v. Allen*, 226 Wis.2d 66, 74, 593 N.W.2d 504, 508 (Ct. App. 1999). This officer of 11 years found that he did not have reasonable suspicion of an OWI based on Dotson driving near bar time in a bar district, seeing his car parked at a bar earlier, putting his window down six inches, and smoking a cigarette. (59:11-13,36-38). Adding the odor of alcohol (of unspecified intensity) onto those building blocks does not tip it over the edge into reasonable suspicion that he had consumed enough alcohol to impair his driving.

Dotson agrees that the time of night may be a factor that may contribute to reasonable suspicion of driving while under the influence. *See Post*, 301 Wis.2d 1, ¶36. However, it is important to consider the context. The published Wisconsin case law known to Dotson (and cited by the state) that finds reasonable suspicion of an OWI, and that includes the late hour

as one building block, also includes some degree of bad driving as another building block.[4]

Bar time combined with bad driving is a powerful combination. That is why the building blocks in the other "late night" cases accumulate to create reasonable suspicion. However, when you combine bar time with the factors here, which are devoid of any bad driving, bodily symptoms of intoxication, or admission to drinking a certain amount, it loses much of its power and reasonable suspicion falls short.

The state has not pointed to any case, published or unpublished, in which reasonable suspicion of an OWI has been found without any driving errors, bodily symptoms of intoxication, and admission to drinking a certain amount of alcohol.

Leon is not merely an "odor of intoxicants" case. (State Brief, p.16). As in the instant case, there were no outward bodily signs that Leon was intoxicated. *Leon*, No. 2010AP001593, ¶10. As in the instant case, there was no evidence of any bad or unusual driving. *Id*. ¶¶18-20. As in the instant case, the officer smelled an odor of alcohol coming from Leon's breath. *Id*. ¶11.

A closer reading of *Leon* shows there is more at play than the odor. There are two additional factors that the *Leon* court analyzed. The first was that Leon had flailed his arms in an argument with an intoxicated female. *Id*. ¶¶4,23-24. The court found that Leon's arm flailing would not suggest impairment and contrasted this against "unruly conduct" in other cases. *Id*. ¶24. As in *Leon*, Dotson was not unruly or belligerent. There was simply a short delay in exiting his

[4] See, e.g., *State v. Waldner*, 206 Wis.2d 51, 556 N.W.2d 681 (1996); *State v. Post*, 2007 WI 60, 301 Wis.2d 1, 733 N.W.2d 634; *State v. Haynes*, 2001 WI App 266, 248 Wis.2d 724, 638 N.W.2d 82; *In re Anagnos*, 2012 WI 64, 341 Wis.2d 576, 815 N.W.2d 675.

vehicle which, in context, was readily explainable by him trying to make arrangements for his car due to the warrant.

The second additional factor in *Leon* was the incident occurred late on a Friday night, around 11:00 p.m. *Id*. ¶¶2,20. The court noted that even if this had occurred around bar time, that still would not have been enough for reasonable suspicion. *Id*. ¶¶20,25. Therefore, this factor is also comparable to Dotson's.

Of course, given the fact intensive nature of reasonable suspicion analyses, it is simply not realistic to find a case that is factually identical to Dotson's. But *Leon* is very similar.

There is simply not enough here to support a reasonable suspicion that Dotson was under the influence of an intoxicant to a degree which rendered him incapable of safely driving or that he had a blood alcohol content at or above 0.08.

CONCLUSION

WHEREFORE, for the reasons stated above, Mr. Dotson respectfully asks this Court to reverse the circuit court, remand with directions to suppress all evidence obtained during and after field sobriety tests, and to allow Dotson to withdraw his plea.

Dated this 20th day of December, 2019.

Respectfully submitted,

_____

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief in proportional serif font. The length of the brief is 2,984 words.

Dated this 20th day of December, 2019.

Signed:

_____

Christina C. Starner

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in context and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of December, 2019.

Signed:

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Christina C. Starner

APPENDIX

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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CERTIFICATION AS TO MAILING

I hereby certify pursuant to Wis. Stat. § 809.80(4) that this brief was deposited in the United States mail for delivery by first class or priority mail on December 21, 2019. Postage has been pre-paid. This brief is addressed to: ADA Eric Enli, 300 East Walnut Street, Green Bay, WI 54301 and Sheila Reiff, WI Court of Appeals, P.O. Box 1688, Madison, WI 53701-1688.

Dated this 21st day of December, 2019.

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